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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re N.S., a Person Coming Under the
Juvenile Court Law.

HUMBOLDT COUNTY DEPARTMENT
OF HEALTH AND HUMAN
SERVICES,

Plaintiff and Respondent,

v.

I.K.,

Defendant and Appellant.

A155628

(Humboldt County
Super. Ct. No. JV150191)

I.K. (Mother) appeals from an order of the juvenile court reinstating the termination of her parental rights to her minor daughter N.S. after our limited remand by to the juvenile court for compliance with the notice requirements of the Indian Child Welfare Act (ICWA). Mother contends she should have had proper notice of the post-remand hearings in the juvenile court, including the hearing at which the juvenile court reinstated the order terminating parental rights after having found ICWA inapplicable. Assuming the absence of notice was error, we conclude it was harmless and affirm.

BACKGROUND

In September 2015, then-20-month-old N.S. was removed from her parents' custody after Mother drove the family car while under the influence, causing the car to

roll, flip over, and land upside down. N.S., who was inside the car, sustained major injuries including a hematoma on the back of her head and bruising on her face, stomach, and legs. Mother, as well as N.S.'s father—who was also in the car—tested positive for a multitude of drugs including cocaine and opiates. Mother nursed N.S. with contaminated breast milk over the objection of medical professionals, and N.S. tested positive for cocaine.

At disposition, N.S. was returned to her parents' care with family maintenance services, but neither parent was able to maintain sobriety. Mother relapsed and tested positive for cocaine, methamphetamine, morphine, and ecstasy. She was arrested for child endangerment after inhaling "Dust-off" while driving erratically on the wrong side of a major thoroughfare with N.S. in the car and driving up the curb and in a "passed out" state as she was pulled over by law enforcement. N.S.'s father was arrested for possession of narcotics for sale, admitted to law enforcement that he had a habit of using three grams of heroin per day, and was arrested on another occasion for driving under the influence and resisting arrest. N.S. was removed from her parents' care and returned to foster care.

On September 27, 2017, the juvenile court held a permanency hearing under Welfare and Institutions Code section 366.26 and terminated parental rights. Only Mother appealed, contending that the juvenile court failed to comply with the ICWA. On July 26, 2018, in an unpublished opinion, *In re N.S.* (July 26, 2018, A153000) 2018 WL 3583634, this court affirmed the judgment but conditionally reversed the order terminating parental rights with a limited remand for the juvenile court to address the ICWA notice defect. We directed the court to reinstate the order terminating parental rights if, after receiving notice, no tribe indicated N.S. was an Indian child within the meaning of the statutory scheme.

Following our limited reversal and remand, the juvenile court held hearings on August 9, 2018, August 23, 2018, and August 30, 2018, to address ICWA compliance issues. Mother was not present for any of these hearings but was represented by counsel.

It does not appear Mother was given notice of them, though respondent Humboldt County Department of Health and Human Services (Department) contends otherwise.

On September 20, 2018, the juvenile court held another hearing for which Mother received no notice and did not attend. Mother's attorney, however, did appear. After reviewing the ICWA inquiry and notice made by the Department, the court found the Department had complied with ICWA notice and inquiry requirements and found ICWA inapplicable. The court reinstated the order terminating parental rights. Mother now appeals.

DISCUSSION

Mother argues the latest order terminating her rights must be reversed because the juvenile court violated her due process rights when it failed to provide her notice of the post-remand hearings. We review her claims de novo. (*In re J.H.* (2007) 158 Cal.App.4th 174, 183 [constitutional issues reviewed de novo].)

Even if we assume without deciding that Mother received insufficient notice, we conclude such error was harmless beyond a reasonable doubt. Mother's counsel appeared at every hearing during remand. Thus, at each hearing Mother was represented by counsel with actual notice of the proceedings. (See *People v. McKenzie* (1983) 34 Cal.3d 616, 631 ["Once an attorney is appointed to represent a client, he assumes the authority and duty to control the proceedings."].) The record also establishes that there would be no different outcome on remand had Mother received notice. Our conditional reversal and limited remand were for the sole purpose of addressing ICWA notice deficiencies. We directed the juvenile court to reinstate the order terminating parental rights if, after receiving notice, no tribe determined N.S. was an Indian child within the meaning of ICWA.

The September 2018 status review report documented the Department's ICWA inquiry and notice efforts. Two tribes responded that N.S. was not eligible for enrollment in their tribes and the Department received no other responses within the statutory period. Mother's counsel agreed there were no further ICWA inquiry or notice issues. The court reviewed the Department's efforts and found appropriate notice and inquiry was made

and again found ICWA did not apply. Based on these findings, the court reinstated termination of parental rights. It is inconceivable how notice to Mother or even her appearance at these hearings would have changed that outcome.

“In an appeal following a limited remand, the scope of issues before the court is determined by the remand order.” (*People v. Murphy* (2001) 88 Cal.App.4th 392, 396-397.) On remand, ICWA was the sole issue before the court, and once the ICWA deficiency was resolved no other section 366.26 issues remained outstanding. (See *In re Francisco W.* (2006) 139 Cal.App.4th 695, 705.) Mother has not argued or shown a reasonable probability that she could have secured a more favorable result had she received notice of these hearings.

Mother argues against our application of a harmless error standard and contends the failure to provide notice constitutes a structural error reversible per se. We disagree. Courts have observed that “[t]he harmless error analysis applies in juvenile dependency proceedings even where the error is of constitutional dimension.” (*In re J.P.* (2017) 15 Cal.App.5th 789, 798 (*J.P.*)). The authorities Mother relies on do not address our Supreme Court’s opinion in *In re James F.* (2008) 42 Cal.4th 901, establishing that where “the outcome of a proceeding has not been affected, denial of a right to notice and a hearing may be deemed harmless and reversal is not required.” (*Id.* at p. 918.) The court in *James F.* rejected a structural error argument and recognized that prejudice is not “irrelevant in a dependency proceeding when the welfare of the child is at issue and delay in resolution of the proceeding is inherently prejudicial to the child.” (*Id.* at p. 917.) The court in *J.P.* further explained: “In juvenile dependency proceedings, no error—even one of constitutional dimension—can be examined based solely on legal principles (no matter how venerable) or only from the parent’s perspective. The reviewing court also must evaluate the effect of the error on the best interests of the child. This is so even though ‘[a] parent’s interest in the companionship, care, custody and management of his children is . . . ranked among the most basic of civil rights.’ [¶] A balancing of interests is required because ‘[c]hildren . . . have fundamental interests of their own that may diverge from the interests of the parent. [Citation.] [¶] Our task is to interpret the statutory

scheme as a whole in a manner that balances the interest of parents and children in each other's care and companionship, with the interest of abandoned and neglected children in finding a secure and stable home.' ” (*J.P., supra*, at p. 799.) Harmless error analysis applies here.

DISPOSITION

The order from the September 20, 2018 hearing reinstating termination of parental rights is affirmed.

Siggins, P.J.

WE CONCUR:

Petrou, J.

Wiseman, J.*

* Retired Associate Justice of the Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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